

October 28, 2013

David L. Zaltsman
Deputy County Counsel
Marin County Civic Center
3501 Civic Center Drive, Suite 275
San Rafael, CA 94903

Re: Your Request for Advice
Our File No. A-13-135

Dear Mr. Zaltsman:

This letter responds to your request for follow-up advice in connection with the *Zaltsman* Advice Letter File No. A-13-083. Your follow-up request concerns the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ As you are aware, our advice is based on the facts provided by the requestor. The Fair Political Practices Commission does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Is it reasonably foreseeable that the decision on the stream ordinance will have a material and foreseeable financial effect on Supervisor Adams’ real property?

CONCLUSION

Based on your facts, it does not appear that there will be any measureable financial effect on the value of Supervisor Adams’ condominium and, therefore, no reasonably foreseeable material financial effect will result from the decision on her real property.

FACTS

The pertinent facts of your initial request were as follows:

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

“For many years, the County of Marin’s General Plan has called for an “expanded” stream-side conservation ordinance to “...implement the SCA standards for parcels transversed by or adjacent to a mapped anadromous fish stream and tributary.” (Marin Countywide Plan, Implementing Program Bio-4.a at page 2-36.) The Marin County Planning Commission has just recommended a proposed ordinance that will be coming to the Marin County Board of Supervisors for de novo consideration. As proposed, the ordinance would contain various new development restrictions depending on the location of the property on over three thousand (3,000) parcels of real property both developed and undeveloped near defined streams. Specifically, one of the primary restrictions are so-called “set-backs” (and further development restrictions) from the “top of the bank” of perennial, intermittent, and some ephemeral streams.”

With your current request you provide the following additional facts:

“[A]t the time of our initial request for advice, we did not provide any facts to attempt to rebut the presumption that the financial effect on the real property interests of the three (3) supervisors at issue in our request is material. And based upon our subsequent conversation, we believe that no such facts could be presented as to two (2) of those supervisors. However as we also discussed, as to the third supervisor - Susan Adams - we believe we can make a compelling case that any decision by her with respect to the proposed ordinance could not have any financial effect on her real property interest.

“Attached as Exhibit ‘A’ to this letter is another copy of the map produced by our GIS department showing the distance of Ms. Adams condominium unit from the edge of the 50 foot stream conservation area setback. (Approximately 380 feet). As you can see there are numerous other condominium units between her unit and the relevant setback zone. This is confirmed by the aerial photos of the vicinity; one from ‘Google earth’ and another from ‘Bing’ maps. (Exhibits ‘B’ and ‘C’). Note that the orientation of the unit to the creek (the wooded area), in the photos is very similar to the Exhibit ‘A’ graphic. (The creek and associated setback are basically due south of the unit.)

“Also included as Exhibit ‘D’ is the Assessor's Parcel Map for this area. (We have circled the unit and added a reference where Miller Creek is located). Once again there are many independently owned condominium units between Ms. Adams unit and the creek and its associated conservation area.

“Equally important, it is our understanding that the terrain around this area is essentially flat, such that Ms. Adams unit does not have any ability to view the area subject to the ordinance. And we also believe that this area of condominiums has been fully developed and ‘built-out’ to its maximum potential for over thirty (30) years. (The subdivision map referenced on the APN map - Roundtree Unit

Two- was approved by the County in 1971, and was fully built out in accordance with the map and associated approved plans shortly thereafter).

“Finally, it is also our understanding that this condominium complex, like many others of this type of development, were developed with specific height limits and ‘zero lot lines.’ (I.e. there is no ‘real property’ owned by the owners of these units other than that upon which their actual unit sits.) Therefore the chances of any of these units ever being in a position to seek further development, other than within the existing footprint, is virtually non-existent.”

Based upon this state of facts, you believe that it is not reasonably foreseeable that the adoption of this ordinance will have any financial effect on Ms. Adam’s property, and that she may participate in the decision.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision when it is “reasonably foreseeable” that the decision will have a material financial effect on one or more of the public official’s interests as specified in Section 87103. (Regulation 18700(a).) The Commission has adopted an eight-step analytical framework to determine whether a public official has a disqualifying conflict of interest in a particular governmental decision. (See Regulation 18700(b)(1)-(8).)

In you facts and in our prior letter, the analysis in Steps 1 through Step 5 were analyzed and resolved. In steps 4 and 5, for example, we advised you that Supervisor Adams’ property was directly involved in the decision and subject to the “one-penny” rule that requires disqualification if there is even a one penny foreseeable financial effect on the value of her property.

The one-penny rule is contained in our current regulation and has been the rule under which we have operated for many years. However, at the June Commission meeting, staff presented reasons why the one-penny does not effectuate the proposes of the Act, specifically the requirement that a financial effect be material, and that it is also an absurdity to attempt to measure a one-penny effect on real property. Because of this, the Commission authorized staff to develop new rules for establishing standards for what constitutes a material financial effect on real property. These rules are currently set to be presented at the November Commission meeting.

While these new standards have not been instituted yet, we cannot conceive of any situation in which, under the facts you have specifically presented regarding your property, that we would find the governmental decision to have material financial effect on Supervisor Adams’ real property. Given the Commission’s direction, and the fact that you have shown

circumstances under which no one could reasonably conclude the decision will raise or lower the value of the property in any measureable sense, we conclude that Supervisor Adams does not have a conflict of interest based on her real property interest.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: William J. Lenkeit
Senior Commission Counsel
Legal Division

WJL:jgl